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No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO LINES, INC., INTERSTATE MOTOR FREIGHT SYSTEM, ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, THE AMERICAN WATERWAYS OPERATORS, INC., AND THE GREAT LAKES SHIP OWNERS ASSOCIATION,
Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO AFFIRM

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Dated: November 7, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Come now the National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate

Motor Freight System, and Roadway Express, Inc., appellee motor carriers and motor carrier associations; the Waterways Freight Bureau, The American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, appellee water carrier associations; and move this Honorable Court to affirm the judgment of the United States District Court for the Southern District of New York on the ground that it is manifest that the questions on which this appeal is based are so unsubstantial as to need no further argument.

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

The National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System, and Roadway Express, Inc., appellee motor carriers and motor carrier associations; Waterways Freight Bureau, The American Waterways Operators, Inc., and The Great Lakes Shipowners Association, appellee water carrier associations; submit this brief in support of their motion, filed herewith, to affirm the judgment of the United States District Court for the Southern District of New York.

THE QUESTIONS ARE MANIFESTLY UNSUBSTANTIAL

That the lawfulness of contract freight rates poses a substantial question on which this Court has never passed is an assertion supported neither by fact nor probability. The Court's never having considered the issue would not alone render substantial the questions on this appeal, since novelty is not the pertinent criterion. There is no need to conjecture on probabilities, however, since the fact is that three times this Court has passed on the question of the lawfulness of the use of contract freight rates by interstate rail carriers, and three times this Court has held such rates unlawful.

In *Armour Packing Co.* v. *United States,* 209 U.S. 56, 80-82 (1908), in passing on a contract rate designed to cover freight shipped over a seven-month period, this Court expressly rejected the contention that "there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company." The following language of the Court rejecting the above contention is, in all respects, apposite to the instant case:

> It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of *one* rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the *only legal rate.* Any other construction of the statute opens the door to the possibility of the very abuses of unequal

> rates which it was the design of the statute to prohibit and punish. (Emphasis added.)[1]

In *Chicago & A. R. Co.* v. *Kirby*, 225 U.S. 155, at 166 (1912), a unanimous Court stated:

> "The broad purpose of the commerce act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error."

The advantage there condemned was expeditious service at a premium charge; while here, the discrimination is compounded by the offer of expeditious service at a *lower* charge. It is well-settled that carrier competition will not excuse unjust discrimination between shippers. *Wight* v. *United States,* 167 U.S. 512, 517 (1897).

In *New York, N. H. & H. R. Co.* v. *ICC,* 200 U.S. 361, at 391-2 (1906), a contract for the sale and transportation of coal by a railroad at a price insufficient to yield the published freight rates, after deducting the cost of purchase and delivery of the coal, was held unlawful, a unanimous Court stating:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism. . . ."

Two, more recent decisions of this Court, though not directly in point, are highly persuasive of the correct-

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[1] This Court upheld the conviction of the shipper for violation of the Elkins Act (49 U.S.C. § 41), reproduced in pertinent part as Appendix A to this brief.

ness of the decisions of the Commission and of the court below: In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297 (1937), this Court, pointing out that the provisions of the Shipping Act of 1916[2] closely parallel those of the Interstate Commerce Act,[3] upheld a decision of the Secretary of Commerce that a contract rate system of a conference of water carriers was unreasonably discriminatory among shippers[4] as prohibited by that Act, and had resulted in establishment of a "practical monopoly" of the traffic involved.[5] Contrary to the contention of appellant here that contract rates are necessary to achieve consistency or stability of service and that the decision below is at odds with the Congressional action of committing the industry to regulation, this Court in *Swayne & Hoyt, supra,* found that the contract rate system was unnecessary to achieve stability of service for the very reason that Congress *had* committed to regulation the rates of the industry involved.[6] More recently, in *Federal Maritime Bd.* v. *Isbrandtsen,* 356 U.S. 481, 493 (1958), this Court held the same type of "dual rate" system of contract rates, whereby a shipper receives a reduced rate in return for his exclusively patronizing certain carriers, violates Section 14, Third of the Shipping Act of 1916 (46 U.S.C. § 812), which

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[2] 46 U.S.C. § 801 et seq.

[3] 300 U.S. at 303.

[4] Id., at 307.

[5] Id., at 306.

[6] Ibid.

prohibits a carrier's using "discriminating or unfair methods" designed to stifle competition.[7]

In the *Armour, Kirby,* and *New Haven* cases discussed above, this Court squarely held that a contract for the transportation of freight at a special rate strikes at the very heart of the Interstate Commerce Act,[8] namely, the non-discrimination provisions of sec-

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[7] In another case which turned on the same language of Section 14, Third of the Shipping Act, *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 889 (S.D.N.Y. 1951), *aff'd per curiam* 342 U.S. 950 (1952), the district court stated: "Dual-rate provisions which authorize arbitrary differentials are obviously not reasonable, for arbitrary conduct means unreasoned or unreasonable conduct, i.e., without reference to an adequate determining principle or standard; and unreasonable discrimination is the equivalent of 'unjust' discrimination. Consequently, here the rate proposed to be charged shippers who do not sign contracts are unreasonably, and therefore unjustly, discriminatory; and the dual rate provisions which permit such rates are invalid." The Commission, in the instant case, in effect found that the differential between the rates charged contracting shippers and non-contracting shippers is arbitrary when it found that "no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement." (313 I.C.C. 247, at 250.)

[8] In still another case, *Kizer* v. *Texarkana & Fort Smith Ry. Co.,* 179 U.S. 199 (1900), a carrier and shipper contracted for the former to transport the latter's lumber over a period of time at an agreed rate. The shipper sued in a state court to recover the excess it paid over the agreed rate. The court refused relief on the ground that the contract violated sections 1, 2 and 3 of the Interstate Commerce Act. This Court dismissed the writ of error for want of a federal question. And in *Union Pacific R. Co.* v. *Goodridge,* 149 U.S. 680 (1893), this Court held contract rates on coal, established by a five-year contract between shipper and carrier, to be unjustly discriminatory under a Colorado statute found by the Court to be "of the same nature as the Interstate Commerce Act, and like that was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property." (149 U.S. at p. 687.)

tion 2 and of the Elkins Act, the terms of which are reproduced as Appendices A and B to this brief. The fact that the Interstate Commerce Commission in the instant case found that such contract freight rates are also a destructive competitive practice, violating a provision of the Interstate Commerce Act which did not exist at the time the *Armour, Kirby,* and *New Haven* cases were decided, is consonant with the *Swayne & Hoyt* and *Isbrandtsen* cases. The point is that each time the question of contract freight rates of regulated common carriers has come before this Court, it has held such rates unlawful by virtue of either the Interstate Commerce Act or other statutory language essentially the same in meaning and purpose. It is unreasonable to expect the Court to overrule its prior decisions which appellant has not mentioned, much less questioned, and which, we submit, are dispositive of the instant case and warrant this Court's affirming the judgment of the court below.

I. Prior Administrative Interpretation

The fact that the Interstate Commerce Commission, in the 20 years during which it has been charged with the administration of the National Transportation Policy, has never held contract rates on freight to be a "destructive competitive practice" is explained by the fact that the Commission never had an opportunity to do so until this appellant sought to revive the practice which seemingly had been laid to rest by earlier decisions of this Court. It should be obvious that the making of freight rates pursuant to contractual negotiations between carrier and shipper involves more than a mere change of form in the manner in which tariffs are published. Thus, it is no comfort

to appellant if we agree that Congress, in proscribing destructive competitive practices, was concerned with rate substance, not merely the form of rate publication.

II. Grounds of the Administrative Action

The Commission concluded that contract rates, under the circumstances of this case, would constitute a destructive competitive practice such as contravenes the National Transportation Policy of Congress, and are, therefore, unjust and unreasonable rates, which are declared unlawful by Section 1 of the Interstate Commerce Act (49 U.S.C. § 1). Although the Commission made findings which would have permitted it to conclude that the proposed rates also violate Section 2 of the Interstate Commerce Act (49 U.S.C. § 2) and Section 1 of the Elkins Act (49 U.S.C. § 41(1)), it refrained from so doing. This should not aggrieve appellant.

The Commission clearly stated findings of fact to support its ultimate conclusion of law. It is significant that these defendant-appellees and the court below had no difficulty in agreeing that the Commission's conclusion that contract rates constitute a destructive competitive practice was based on its findings that such rates (1) would be destructive of the existing rate structure, and (2) would destroy the competition of other carriers for the duration of the contract period. Appellant's claim that the Commission failed clearly to articulate its findings resolves itself into a contention that the Commission committed legal error in not labeling the findings as such, listing them consecutively, and following them by the word "therefore," followed by a statement of its ultimate conclusion of law. We submit that no such requirement was incum-

bent upon the Commission and that, given the will, the findings may be ascertained with a minimum of effort.

III. Meaning and Application of the Legal Standard

Appellant complains that the Commission failed "to set forth or apply the standard of lawfulness" enunciated by the "destructive competitive practices" provision of the National Transportation Policy. This, appellant says, is the consequence of the Commission's having failed clearly to articulate the factual basis or bases which support its ultimate conclusion. We submit, as aforestated, that in support of its ultimate conclusion, the Commission stated clearly two basic findings of fact, either of which alone sustains the conclusion of law.

Moreover, appellant errs in assigning to the Commission the function of establishing the standard of lawfulness. Constitutionally, this is the non-delegable function of the legislative body; and the power of its creature, the agency, extends only to ascertaining whether or not the facts of a given controversy require application of the standard established by the legislature. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 144-5 (1941). This, the agency has done.

The error of appellant's belief that the Commission failed to "go beyond the mere words of the statute in revealing the basis for their action,"[9] led to the confused claim that "since the court below could find no comfort in the Commission's report, it resorted to statutes other than the Interstate Commerce Act."

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[9] J.S., p. 12.

The court below referred to certain terms used by Congress in the Federal Trade Commission, Clayton, and Shipping Acts—not to compensate for deficiencies in the Commission's report—but, rather, to illustrate the error of appellant's argument that the term "unfair or destructive competitive practices" could not comprehend contract rates because such rates were not a problem when Congress enacted that term. The court below merely showed that, prior to enactment of that statutory language, Congress had used almost identical terms to outlaw practices which in form, substance, and intended results are identical to the one proposed here.

In being "not unmindful" of Congress' policy favoring competition, as expressed in the antitrust laws,[10] the Commission did no more or no less than this Court requires of it. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80, 82-6 (1944).

IV. Evidentiary Basis of Agency's Findings

Appellant's claim that the Commission's findings of fact are unsupported by substantial evidence of record overlooks the *uncontroverted* evidence which established (1) that appellant would offer contract rates to other shippers on its lines, which are extensive, (2) that motor carriers, in self-defense, would reply in kind, and (3) that appellant considers the prevailing principles of ratemaking "obsolete" in that the law "contemplates factors other than those which historically have been considered in connection with classifica-

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[10] 313 ICC at 253.

tion matters," which factors are comprehended, appellant asserts, by contract rates. Thus appellant's own evidence forced the conclusion that destruction of the existing rate structure in the surface transportation industry was the design, as well as the likely result, of the proposed rates.

The Commission was entitled to treat the existing nationwide rate structure as just and reasonable and otherwise lawful until the contrary was proved. Appellant cites *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935) as forbidding such action by the Commission, but that case is not applicable. There, (1) the rate relationship in issue involved only a few specific movements of traffic; (2) the historic rate relationship between those specific movements had recently been disrupted by a competitor; and (3) the proponent of the new rate sought to re-establish the pre-existing, historic rate relationship. Thus, the Commission was there in a position easily to ascertain the reasonableness of the pre-existing rate relationship. Moreover, this Court held that the Commission was precluded from assuming the reasonableness of the rate structure, not as it historically had existed, but as it existed following its disruption. Finally, in that case, involving as it did specific movements of traffic, the Commission had the power to prevent further rate reductions on that traffic in the future. Here, however, the issue is not merely the lawfulness of rates on a particular movement of traffic but, rather, a principle of ratemaking so fundamental as to have universal application once approved. Indeed, the Commission observed that appellant's "arguments are directed mostly to the contention that existing ratemaking principles and standards of lawful-

ness should be changed."[11] No such issue was involved in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra.*

Ample evidence of record supports the Commission's other basic finding, *viz.*, that contract rates would destroy competition for the duration of the contract. Briefly stated, the evidence was that when the contract rate was published, the three appellee motor carriers collectively enjoyed approximately 65% of the involved traffic, but that the shipper intended to "return" this traffic to appellant upon approval of the contract rate. The shipper's intention and the Commission's prediction ripened into a reality when the rate went into effect after expiration of the seven-month statutory period of suspension.

Even in the absence of evidence that competition would be destroyed by the proposed rates, the Commission would have been justified in inferring as much from the very terms upon which the contract rate became operative. In *FTC* v. *Pacific States Paper Assn.*, 273 U.S. 52, 63 (1927), this Court upheld the Federal Trade Commission's finding, purely by inference, that use of price lists would lessen competition.

The Commission was under no obligation to find the relative competitive positions of appellant and its competitors, since the statute proscribing unfair or destructive competitive practices contains no exemption based on competitive position or otherwise. Moreover, it would seem that such findings, if made, would ill-serve appellant; since the evidence showed that even prior to the contract rate, it enjoyed a rate advantage on the particular traffic involved and a greater share thereof than any other carrier, rail, motor, or otherwise.

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[11] 313 ICC at 249.

CONCLUSION

For the reasons aforestated, the questions upon which decision of this cause depends are so unsubstantial as not to need further argument. The judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: November 7, 1961

APPENDIX A

The Elkins Act, § 1, in part. 49 U.S.C. § 41(1). ". . . The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. . . ."

APPENDIX B

Sec. 2 of the Interstate Commerce Act. (49 U.S.C., § 2.) "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered,

in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

PROOF OF SERVICE

I Frederick A. Babson, Jr., one of the attorneys for the defendant-appellees on whose behalf this Motion and Brief are filed, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of November, 1961, I served copies of the foregoing Motion and Brief in support thereof on the several parties to this appeal, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Michael I. Miller, Esq., Attorney, Department of Justice, Washington 25, D. C., and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On The New York Central Railroad Company, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert D. Brooks, Esq., its Attorney, 466 Lexington Avenue, New York 17, New York.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on June 14, 1961, of a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325. The court below dismissed the complaint which sought to enjoin and set aside an order of the Interstate Commerce Commission dated February 10, 1961, ordering cancellation of a tariff proposed by appellant. The opinion of the district court (J.S. 15–26) is reported in 194 F. Supp. 947, the Commission's decision (J.S. 27–43) at 313 I.C.C. 247.

Appellant's tariff proposed a reduced rate on carload shipments of rugs and carpets from Amsterdam, New York, to Chicago, Illinois, which was below the established rates for such traffic. This reduced rate was to be available only to shippers which contracted to ship over appellant's lines at least 80% of their traffic in rugs and carpets moving from Amsterdam to Chicago during the annual period of the contract. The contract would also require each such shipper to furnish an indemnity bond guaranteeing the payment of the higher non-contract rates should the shipper default in performance. The shipper would be required to supply the carrier with an affidavit setting forth for the contract period the total tonnage of its rug and carpet shipments between the points involved by all modes of transportation. The contract would prohibit the carrier from voluntarily increasing the contract rates during the contract term, and would permit the shipper to cancel, without payment of any further charges, if the carrier failed to deliver 70%

of the traffic at Chicago on or before the sixth morning after its receipt at Amsterdam (J.S. 28–29).

The Commission issued a report [1] holding that the proposed contract rates were "unjust and unreasonable" under Section 1 of the Interstate Commerce Act, "in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act" (J.S. 36–37).[2] The Commission's conclusion was based on findings that (J.S. 36–37):

> The inevitable effect of a substantially exclusive patronage contract such as is involved here * * * is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor. * * *

The Commission also found that the proposed rates "would have a destructive effect on other rates," since they would result in a chain reaction among all other carriers, each seeking tying arrangements with shippers. The end result would be the destruction of the existing general rate structure

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[1] By stipulation a hearing examiner's report was waived and the case before the Commission was considered on verified statements.

[2] The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1, is set forth at J.S. 44.

which, according to the Commission, "is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system" (J.S. 35). No "strong and compelling reasons" were shown to justify such destructive effect (J.S. 35); the railroad can meet its alleged competitive problem by using "the remedy of reducing regularly published rates" (J.S. 37).

The protestant motor and water carriers had urged that the proposed contract rates violated not only the national transportation policy but also Sections 2 and 3 of the Interstate Commerce Act, the Elkins Act and the Sherman Act (J.S. 29). Before considering the competitive impact of the rates, the Commission noted that while validity under the Sherman Act was not properly a separate issue in a Commission proceeding, the Commission "may not be unmindful of the general policy of the antitrust laws in favor of competition in applying the standards of the Interstate Commerce Act" (J.S. 35–36). Although the Commission discussed objections to the proposed rates under Sections 2 and 3 of the Interstate Commerce Act and the Elkins Act,[3] its report stated, just

[3] In that connection, the Commission noted that there was no element of cost-of-service savings by volume shipments or differences in transportation circumstance, which could justify the dual rates (J.S. 32–34). It also stated that the carrier's commitment, that no increase would be made in the contract rates during the contract period unless ordered by the Commission, appeared to be inconsistent with the continuing obligation of the carrier to establish and maintain just, reasonable and otherwise lawful rates (J.S. 35).

before reaching the ultimate findings, "In view of our conclusion under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act" (J.S. 37).

Three commissioners joined in the report, and five commissioners concurred. Of the latter, one stated his concurrence in the report and indicated that he would also have found the proposed tariff in violation of the Elkins Act and Sections 2 and 3 of the Interstate Commerce Act (J.S. 37–38); two concurred in the result on the ground that the effect upon competing modes of transportation would be contrary to the national transportation policy but took exception to the report's "gratuitous dissertation" regarding Sections 2 and 3; and two concurred in the result without opinion. Two commissioners dissented (J.S. 39).

The three-judge district court unanimously sustained the Commission's decision. The court (per Circuit Judge Friendly) first noted that appellant's principal attack was on the adequacy and clarity of the findings and the alleged absence of a majority in support of any conclusion. The court held that the Commission's "ultimate conclusion is plain," and "even if we were to eliminate the votes of Commissioners Winchell and McPherson altogether [concurring in the Commission's result without opinion], six commissioners would have joined in concluding that the rates 'are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act' " (J.S. 21).

In construing the scope of the Commission's authority to prohibit "unfair or destructive competitive practices" under the national transportation policy, the court referred to cases construing analogous language under Section 5(a) of the Federal Trade Commission Act, Section 3 of the Clayton Act, and Section 14 Third of the Shipping Act, 1916 (J.S. 21–23) and pointed out that "these earlier statutes give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance." The court held, therefore, that "the Commission was authorized to find that a tariff such as that here filed by the Central was an 'unfair or destructive competitive practice' and that the Commission's Report was adequate to that end." The court stated (J.S. 23):

> The effect of such a contract upon competition is quite different from that of mere reduction in charges. In the latter case a competitor who meets the reduction is in as good a position to compete as theretofore; here, even if he meets the contract tariff with a similar one, he has some initial handicap, and whichever competitor gets the traffic, the other is then in a poor position to compete. All this would be a valid consideration for the Commission if only competing railroads were involved; it is doubly so in view of Congress' direction in the National Transportation Policy "to recognize and preserve the inherent advantages of each" mode of transportation.

The court also sustained the rejection of a rate-making practice "which [the Commission] * * * believed would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service." In the court's view appellant had made "no showing of circumstances uniquely demanding or justifying this practice" (J.S. 25).

ARGUMENT

This case presents no substantial question requiring plenary review by this Court. Although the Commission might have rested its decision on one or more of several available grounds, it chose to rely on the congressional directive in the national transportation policy prohibiting "unfair or destructive competitive practices." It held that appellant's proposed dual rate system with the lower rates conditioned upon "substantially exclusive patronage" (J.S. 36) was unlawful because of its "inevitable" destructive impact upon competition (J.S. 36) and the absence of countervailing justification (J.S. 35, 37). The Commission found it unnecessary to pass upon other issues raised by the parties. The case, therefore, involves a narrow holding unanimously affirmed below, not "important and far reaching questions" about the legality of contract rates, as alleged by appellant (J.S. 6). The decision below was correct and should be affirmed.

Congress has expressly enjoined the Commission to administer and enforce all the provisions of the Interstate Commerce Act with a view to carrying out the

national transportation policy (54 Stat. 899; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82–83). Accordingly, the Commission correctly ruled (J.S. 36) that, in determining whether proposed rates are "just and reasonable" under Section 1 of the Act,[4] it is bound to consider the objectives of the national transportation policy—"to recognize and preserve the inherent advantages" of all modes of transportation; and "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

Under these provisions, the Commission in passing upon the rates proposed for contracting shippers, clearly had to consider the effect of the dual rate upon competing carriers. There is no basis for appellant's contention (J.S. 7–8) that the Commission could look only at the rate level, and was barred from considering the effects of the "substantially exclusive patronage" upon which appellant's rates would be conditioned. Only by considering such effects could the Commission carry out its duty to prevent "unfair and destructive competitive practices." In addition, since appellant's competitors are in motor and water transportation, the Commission was required to consider the competitive effects of the proposed tariff in order to carry out the other above-stated objective of the national transportation policy, preservation of the

[4] Secs. 1 (4), (5), 49 U.S.C. 1 (4), (5).

inherent advantages of competing modes of transportation.[5]

Furthermore, the Commission and the court below correctly held that reference to the antitrust laws is appropriate in determining whether a practice is "unfair or destructive" to competition (J.S. 21–23, 35, 36). The teaching of *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86–87, is that the Commission should not "ignore" the policy underlying the antitrust laws, since "[t]he preservation of independent and competing * * * carriers unquestionably has bearing on the achievement of those ends" of the national transportation policy.

The Commission and the court below did not "incorporate antitrust concepts" as a separate standard for "regulated carrier pricing" as appellant implies (J.S. 8). Rather, they referred to them for aid in the construction of the phrase "unfair or destructive competitive practices" in the transportation policy, just as the court also drew upon the analogy of the Shipping Act, 1916 (J.S. 22–23). Indeed, the decision

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[5] J.S. 23–24, 39. The court below, in another case, similarly held that the Commission in granting a certificate of public convenience and necessity, properly considered the allegation of "unfair competitive practices" under the national transportation policy, the requirements of which are a guide to application of the standards of the certificate section of the Act. *Luckenbach S.S. Co.* v. *United States*, 122 F. Supp. 824 (S.D. N.Y.), affirmed, 347 U.S. 984.

Appellant, by failing to raise before the Commission its contention that the Commission could not consider the effect of the dual rate on competition, may be precluded from asserting it here. Cf. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33.

of this Court under the Shipping Act in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, is particularly relevant. There this Court held that the Maritime Board had improperly approved a dual rate system dependent upon exclusive patronage because it constituted a "discriminatory and unfair method" of eliminating competition. As the court below stated, the interpretations of these prior statutes applicable to competitive practices "give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance" (J.S. 23) and sustain the Commission's action in this case.

Contrary to appellant's further contention (J.S. 12–14), no substantial question exists as to the adequacy of the Commission's findings and their basis in the record. Testimony of officials of the supporting shipper and protesting carriers[*] supports the Commission's finding that the proposed rate was intended to, and would, divert traffic to the appellant from motor and water carriers by means of the "substantially exclusive patronage contract" upon which it was conditioned. Appellant would thereby obtain business, despite the "offer of superior transportation service at an equivalent or lower rate" by a competing carrier in a different mode of transportation (J.S. 23–24, 36–37).

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[*] See verified statements of Herbert F. Sixtus (R. 164–165) and Frederick G. Freund (R. 238).

Moreover, as the Commission and the court below found, there was no justification to outweigh these destructive effects on competition (J.S. 25, 35, 37). As the Commission pointed out, appellant can lower rates where "necessary to regain or retain traffic" by "reducing regularly published rates" (J.S. 37). Appellant's proposal, instead, to resort to exclusive dealing arrangements not only is destructive of competition but constitutes an unwarranted departure from the established pattern of ratemaking and carrier competition in this country (J.S. 24–25, 35). The Commission's finding as to the destructive effect on the rate structure is supported by statements of appellant and other parties cited in the report (J.S. 35).[7]

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[7] The court below properly rejected appellant's contention based upon *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 509, that the power to deal later with effects of a change in the rate structure required initial sanctioning of its proposal. In that case this Court required that the proposed rates be allowed to go into effect because there had been no finding that the existing rate structure was reasonable or that the proposed rates were unreasonable. The Commission made both findings here. See Statement *supra*, pp. 3–4. It specifically found the proposed rates to be unlawful because of their inevitable destructive impact upon competition and because, as the court below stated, they "would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service." "[T]he Commission was not compelled to permit the experiment" in the absence of any "showing of circumstances uniquely demanding or justifying this practice" (J.S. 25).

Finally, appellant's contentions that the Commission's opinion "lacks * * * clarity" (J.S. 9–11) and fails "to clearly articulate" a general standard governing destructive competitive practices (J.S. 11–12) rests primarily, we believe, upon its reading of the Commission's discussion with regard to Sections 2 and 3 of the Interstate Commerce Act and the Elkins Act. Underlying appellant's jurisdictional statement on these points is its desire that the Commission should have made adjudications and findings under these other statutory provisions and ruled upon the validity of "contract rate" programs in general. The Commission, however, may choose to develop in a more cautious and pragmatic manner through case by case adjudication the validity of contract rates and their effects.

In this Court as well, there is no need or basis to decide whether the Commission's decision is sustainable on grounds or under statutory provisions other than Section 1 of the Interstate Commerce Act and the national transportation policy upon which it rested. Nor is there reason to determine whether other contract rates in other situations might be valid. The adjudication by the Commission that the proposed rates were "unjust and unreasonable" because they constitute an unfair or destructive competitive practice in violation of the national transportation policy is supported by Commission findings, and was properly sustained by the three-judge court.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1961.

Office-Supreme Court, U.S.
FILED
DEC 19 1961
JOHN F. DAVIS, CLERK

No. 482

IN THE

Supreme Court of the United States

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, and ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, and THE AMERICAN WATERWAYS OPERATORS, INC., and THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTIONS TO AFFIRM

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No. 482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO., INC., INTERSTATE MOTOR FREIGHT SYSTEM, and ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, and THE AMERICAN WATERWAYS OPERATORS, INC., and THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTIONS TO AFFIRM

I.

The uniqueness and importance of the issues.

The motor and water carrier appellees argue that this court in prior cases[1] has passed on the lawfulness of con-

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[1] *Armour Packing Co.* v. *United States*, 209 U. S. 56 (1908); *Chicago & Alton R.R. Co.* v. *Kirby*, 225 U. S. 155 (1912); *New York, N.H. & H. R. Co.* v. *I.C.C.*, 200 U. S. 361 (1906).

tract freight rates and therefore the issues here presented are not novel. These cases involved charges assessed by the carrier based on private agreements at variance with the legally published rate. In the instant case, the contract rate was published in accordance with Section 6 of the Interstate Commerce Act (49 U.S.C. Sec. 6), to alternate with existing published non-contract rates, which were not cancelled. It was thus available to all shippers and receivers to the same extent as all other duly filed and published non-contract rates. The cases cited by the motor and water carrier appellees all turned on the question of discrimination under Section 2 of the Interstate Commerce Act (49 U.S.C. Sec. 2), because the privately agreed upon rates in those situations applied only to individually favored shippers. These cases are not dispositive or even relevant to the issues presented in this proceeding since the instant contract rate was the duly published and legally applicable rate available to all shippers that chose to use it and also because the decision by the Commission herein does not even bring the issue of discrimination before this court.

The government argues that since the Commission's decision was based solely on the destructive competitive practices provision in the National Transportation Policy, this case involves a narrow holding "not 'important and far-reaching questions' about the legality of contract rates."[2] The fact that the Commission chose to condemn these rates as violative of the National Transportation Policy and thus Section 1 of the Interstate Commerce Act, in no way renders its decision less important and far-reaching to the transportation industry in general, and to appellant in particular. This decision is the Commission's first adjudication on this subject and while not specifically condemning contract rates *per se*, *it* cannot but have a substantial effect on whether or not carriers or shippers de-

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[2] Government's Motion to Affirm, p. 7.

siring the benefits of such rates must seek corrective legislation, particularly in the light of representations made by the Commission's Chairman to the Senate Committee considering the Transportation Act of 1958 (15 Stat. 572). (See appellant's brief in the court below, pp. 3-4, R. 630-631.) The importance of the questions presented requires plenary consideration by this court.

II.

The Commission's report and order lack the clarity requisite to a valid order.

Appellant has maintained both in the court below and in its Jurisdictional Statement that the Commission's report and order lack the clarity necessary for a valid administrative determination as defined by this court in *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U. S. 499, 511 (1935); *Beaumont, Sour Lake and Western Railway* v. *United States*, 282 U. S. 74, 86 (1930); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196-7 (1947); concurring opinion of Frankfurter, J., in *Secretary of Agriculture* v. *United States*, 350 U. S. 162, 175 (1956). This argument is based primarily on the fact that it is not possible to ascertain with any degree of certitude which of the multitudinous Commission findings are actually intended to support its limited ultimate conclusion.

Motor and water carrier appellees assert that "given the will, the findings may be ascertained with a minimum of effort." (Carriers' Motion to Affirm, p. 10.) The holdings of the previously cited cases indicate that no such effort is required of the litigants or the courts. See *Securities and Exchange Commission* v. *Chenery, supra*, at 196-7.

In the court below, each of these carriers filed separate briefs, each brief differing as to which of the Commis-

sion's findings were intended to support its ultimate finding and none of which agreed with the two findings selected by the court below as the essential findings supporting the Commission's ultimate conclusion.[3] Likewise the government in both its brief and oral argument to the court below differed with the analysis of the carrier appellees and with the reasoning of the decision of the district court.[4] In its Motion to Affirm, the government now asserts at page 3 that the Commission's decision was based on the findings that:

> "* * * The inevitable effect of a substantially exclusive patronage contract such as is involved here * * * is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor." (313 ICC at 253).

The government then goes on to say that the Commission found the proposed rates would also have a destructive effect upon the rate structure, but the government does not state that this finding by the Commission was intended to support its ultimate conclusion under the National Transportation Policy. Thus, even at this stage in the proceeding, there is disagreement among the appellees themselves and the court below as to which Commission

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[3] The statement at page 9 of the carrier appellees' Motion to Affirm to the effect that appellant and the court below agreed on which of the Commission's findings supported its ultimate conclusions is incorrect. See appellant's brief in the court below, pp. 8-14 (R. 635-41), and its reply at p. 4 (R. 664) and particularly at the top of p. 12 (R. 672).

[4] See particularly transcript of oral argument in the lower court, pp. 36-42 (R. 843-849).

findings were intended by the Commission to support its ultimate conclusion. Appellant submits that this clearly demonstrates the soundness of its position that the report and order of the Commission lack the clarity requisite to a valid administrative determination and that this court should not permit such an order to stand, particularly where this determination by the Commission is its first on an important new rate-making innovation and is thus bound to have far-reaching consequences in the transportation industry.

III.

The Commission has misinterpreted and misapplied the destructive competitive practices provision.

Appellant has maintained that the Congressional purpose in enacting the destructive competitive practices provisions of the National Transportation Policy was to correct the then prevalent practice of cut-throat rate slashing. This position is buttressed by the fact that the Commission since the enactment of that provision in 1940 has consistently so applied it[5] and where questions concerned the manner or form of publication of rates, the other substantive provisions of the act were deemed controlling.[6]

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[5] See appellant's brief in the court below, p. 24 (R. 651). This policy of the Commission has been consistently applied even in its latest adjudications. See Investigation and Suspension Docket No. 7559, *Grain-Kansas City, Omaha and Related Origins to Lawrenceburg, Ind.*, I.C.C. (Decided November 2, 1961) where at page 6 of the mimeographed report the Commission said "The proposed rates are compensatory and no lower than necessary to meet the all-barge competition. Thus, there is no basis for saying that they constitute destructive competition."

[6] For example, in deciding the lawfulness of volume rates, Sections 2 and 3 of the Act have been the determining factors. See *Coal from Ky., Va. and W. Va. to Virginia*, 308 I.C.C. 99; *Coal from Ill., Ind. and Ky. to Illinois and Indiana*, 308 I.C.C. 673; and *Coal to New York Harbor Area*, 311 I.C.C. 355. It is submitted that the instant decision of the Commission is entirely inconsistent with the holding and rationale of these cases.

Appellees argue that the Commission in interpreting the destructive competitive practices provision of the National Transportation Policy looked to various provisions in the anti-trust laws in order to determine what types of practices were intended to be proscribed by the Congress when using similar terminology. (Government Motion to Affirm, pp. 9-10.) It is clear from a reading of the Commission's decision that the Commission did not do so and in fact there is no language in the decision which in any way indicates what factors the Commission did take into account in interpreting this phrase. If reliance was placed on interpretations of similar language in the anti-trust laws, it is equally clear that in applying any standard the Commission failed to consider factors which would have been relevant to a finding of destructive competitive practice under the anti-trust laws. Thus, the Commission refuses to even consider the line or amount of commerce affected by this rate[7] or the relative competitive positions of the competitors here involved.[8] A mere reading of the opinion of the court below and the report of the Commission demonstrates that the court below and not the Commission supplied the interpretation of the destructive competitive practices provision which is here being urged by appellees. It is submitted that this failure by the Commission to give any meaningful interpretation to the standard which it apparently intended to apply is error. *Dixie Carriers* v. *U. S.*, 143 Fed. Supp. 844, 850 (1956), reversed on other grounds 355 U. S. 179 (1957). Nevertheless, the interpretation by the court below, which of necessity incorporates anti-trust pricing criteria in judging an already regulated price structure, brings before this court important questions which should be fully considered. *Quare,*

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[7] See *Tampa Elect. Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

[8] See *Balian Cream Co.* v. *Arden Farms Co.*, 104 Fed. Supp. 896 (1952); affirmed 231 F. 2d 356 (1955); cert. den. 350 U. S. 991 (1956); rehearing denied 351 U. S. 729 (See 313 I.C.C. at 248-9).

are the courts or the Commission charged with the interpretation and application of this standard in any specific situation? See *FTC* v. *Gratz*, 253 U. S. 421, 427-8 (1920); Frankfurter, J. dissenting in *FTC* v. *Motion Picture Advertising Co.*, 344 U. S. 392, 404-5 (1953). In the instant case, the Commission's report lacks any of the findings that are essential in any case involving application of anti-trust standards, and if the courts are charged with interpreting and applying the destructive competitive practices provision, it is apparent from the opinion of the court below that it did not make any independent examination of the record in order to properly apply its standard.

Great weight has been placed by appellees on this court's decision in *Federal Maritime Board* v. *Isbrandtsen*,[9] 356 U. S. 481 (1958), as sustaining the Commission's action. It is submitted that *Isbrandtsen* has no relevance to this proceeding. That case involved a technical interpretation of a statute held expressly to proscribe the type of dual rate contract published by a carrier conference therein condemned. The court found it was the purpose of those dual rate contracts to coerce other carriers into joining shipping conferences (356 U. S. at 483, 494-5). In contrast, the instant contract rate was published by a single carrier and there is no contention by anyone that this rate was intended to coerce any competitor to take any action of any kind. The case turns on an interpretation of a statute not remotely resembling anything in the Interstate Commerce Act and affords no justifying basis for the Commission's action in this proceeding.

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[9] It is particularly significant that the Commission's decision does not even cite this case or in fact any of the antitrust decisions cited by the lower court.

IV.

The Commission's findings are insufficient to support its report and order.

The issues relating to the sufficiency of the Commission's findings and the invalidity of its order are emphasized by the improper interpretation given by the Government to *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935). The footnote at page 11 of the Government's Motion to Affirm states that the court in *Milwaukee* required that the proposed rates be allowed to go into effect because there had been no finding that the existing rate structure was reasonable or that the proposed rate structure was unreasonable. Actually, *Milwaukee* holds that in order for the Commission to find a rate destructive of any given rate structure, it must find that: (1) the existing rate structure is reasonable, *and*, (2) the Commission must be without power to prevent further action having any destructive effect on that rate structure. In the instant case, of course, the Commission had no evidence before it upon which it could predicate a finding of reasonableness of the rate structure and the Commission's Report obviously could not validly satisfy the court's first requirement. Since the Interstate Commerce Act empowers the Commission to approve or disapprove of any rates published in response to the instant rate, this court's second requirement obviously remains unsatisfied.[10]

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[10] See *New York, N.H. & H. RR Co.* v. *U. S.*, Fed. Supp. (U. S. District Court—District of Connecticut, decided November 15, 1961). At mimeo page 17 the court states: "The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U.S.C. § 15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power."

Conclusion

As the Court knows, the railroad industry is closely regulated under the Interstate Commerce Act and the acts related thereto. Accordingly, the Court's requirement that the Commission, in promulgating administrative orders, express with certitude in its report the principles and basis for its decision, is a substantive requirement essential to the operation of the regulated industry.

The rates in question were filed to become effective September 30, 1959. As the record shows, they were designed to recover traffic which the New York Central was losing rapidly. The thrust of this appeal is to require the Commission to define with reasonable precision the latitude open to management to publish contract rates to meet the prevailing market conditions. The delay which has been incident to the establishment of these rates would be intolerable except on the basis of obtaining administrative landmarks which can guide future management decisions. This is particularly important because the railroads had inaugurated the legislative process which was arrested by a representation by the Chairman of the Commission that

> "* * * there was nothing in the law to prevent it so long as the rate adjustment does not create undue discrimination or preference and prejudice, that the carriers were free to initiate those proposals, and our specific recommendation in this regard is that there is nothing for the Congress to do. It is entirely within the hands of the carriers."
>
> (Hearings Before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, Second Session on Problems of the Railroads, Part 3, p. 1899)

In short, the Commission's representation to the Smathers Committee was that no additional legislation was

required to authorize the establishment of contract rates as long as such rates did not violate Sections 2 and 3 of the Interstate Commerce Act. The Commission's report here before the Court does not find it necessary to make any findings under Sections 2 and 3, because it condemns the contract rate as destructive competition under the National Transportation Policy and therefore violative of Section 1 of the Interstate Commerce Act.

It is suggested that the Court's rule requiring certitude in administrative decisions was designed to eliminate precisely the confusion which prevails in the instant report of the Commission, a certitude which is an absolute necessity not only for sound management decisions in the regulated industry but also a prerequisite to sound remedial legislation, if indeed legislation is required. Thus, the Court's requirement is not only justified as an integral part of procedural "due process," but in the instant case is vitally important to sound decisions, both by the regulated industry and the Congress.

The questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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Dated: December 19, 1961.

Proof of Service

I, Robert D. Brooks, one of the attorneys for The New York Central Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of December, 1961, I served copies of the foregoing Reply to Motions to Affirm on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Lee Loevinger, Esq., Department of Justice, Washington 25, D. C. and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Waterways Freight Bureau, The National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., The American Waterway Operators, Inc., and the Great Lakes Ship Owners Association, intervening defendant, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows:

   To Harry C. Ames, Esq., Attorney for Waterways Frieght Bureau, Transportation Building, Washington 25, D. C.

Proof of Service.

To Frederick A. Babson, Jr., Esq., Attorney for National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System and Roadway Express, Inc., 2001 Massachusetts Avenue, N. W., Washington 25, D. C.

To John H. Eisenhart, Jr., Attorney for American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, Inc., Suite 411, 1025 Connecticut Avenue, N. W., Washington 6, D. C.

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Railroad Company,
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New York 17, New York.